LIBRARY
SUPREME COURT, U.S.

Office Supreme Court, U.S.
FILED
SEP 26 1962
JOHN F. DAVIS, CLERK

No. 406

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

BOLLING R. POWELL, JR., *Petitioner*

v.

JOHN W. MAHER, Trustee in Bankruptcy of Ferro, Inc., *Respondent*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROGER ROBB
1100 Tower Building
Washington 5, D. C.
Attorney for
John W. Maher, Trustee in Bankruptcy, Respondent

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Question Presented for Review	1
Statutes and Rules Involved	3
Counter-Statement of the Case	4
Argument	11
Conclusion	23

CITATIONS

Cases:

Alexander v. *Hillman*, 296 U.S. 222 (1935) 11, 12, 15, 18

Brown v. *Rubinstein, Trustee*, — U.S. App. D.C. —, 288 F.2d 168 (No. 16087, 1961) 11

Case v. *Los Angeles Lumber Products Co.*, 308 U.S. 106, 127 (1939) 20

Cline v. *Kaplan, et al*, 323 U.S. 97 (1944) 16

Columbia Foundry Co. v. *Lochner*, 179 F.2d 630 (CCA 4, 1950) 11, 12, 15

In re Eakin, 154 F.2d 717 (CCA 2, 1946) 16

In re Ferro; Incorporated, 198 F.Supp. 244 (D.C.D.C., 1961) 10

Florance v. *Kresge*, 93 F.2d 784 (CCA 4, 1948) 12

Inter-State National Bank of Kansas City v. *Luther*, 221 F.2d 382, 388, cert. granted, 350 U.S. 810, dismissed per stipulation, 350 U.S. 944 (CCA 10, 1955) 12, 17, 20

Louisville Trust Company v. *Comingor*, 184 U.S. 18 (1902) 16

Maggio v. *Zeitz*, 333 U.S. 56, 61-63 (1948) 19

In re Majestic Radio and Television Corporation, 227 F.2d 152, cert. den. 350 U.S. 995 (CCA 7, 1955) 17

In re Nathan, 98 F. Supp. 686, 691 (D.C.S.D. Cal., 1951) 12, 21

Pepper v. *Litton*, 308 U.S. 295 (1939) 21

Pickens v. *Roy*, 187 U.S. 177 (1902) 16

In re Solar Manufacturing Corp., 200 F.2d 327, cert. den. sub. nom. *Marine Midland Trust Co.* v. *McGirl*, 345 U.S. 940 (CCA 3, 1952) 11, 12, 14

Page

Morton G. Thalhimer, Inc. v. *Florance*, 58 F.2d 23 (CCA 4, 1932) 15
In re Vadner, 17 F.2d 721 (CCA 9, 1927) 15
Whitney v. *Wenman*, 198 U.S. 539 (1905) 19

STATUTES AND RULES:

Bankruptcy Act, Sec. 2a(7), (15), 11 USCA Sec. 11a (7), (15) 3, 19
Federal Rule of Civil Procedure 13(a) 4, 21
General Order 37, 11 USCA following Sec. 53 ..... 3, 21

MISCELLANEOUS:

Collier on Bankruptcy (14th ed. 1961), Sec. 23.08(6) 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 406

BOLLING R. POWELL, JR., *Petitioner*

v.

JOHN W. MAHER, Trustee in Bankruptcy of Ferro, Inc., *Respondent*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED FOR REVIEW

In the opinion of the respondent, the question presented is whether the Court of Appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter, or in conflict with applicable decisions of this Court, by holding that the petitioner, a claimant against the estate of a bankrupt corporation, could not properly deny the jurisdiction of the bankruptcy court, on a counterclaim by the trustee in bankruptcy, to order the

petitioner to turn over to the trustee a fund, property of the bankrupt, held by the petitioner, the order providing that the turnover was subject to a determination by the court as to the validity of an attorney's lien on the fund asserted by the petitioner, and the circumstances resulting in the order being as follows:

(a) the petitioner, the president, a director, and the dominant and controlling stockholder of the corporation, as well as its attorney, was ordered by a judgment of the United States District Court for the District of Columbia in a prior civil action to pay over to the corporation the fund involved, property of the corporation, which the court found the petitioner had transferred to himself with intent to defraud, delay or hinder creditors, and

(b) after the judgment of the District Court in the civil action was affirmed on appeal, and on the day following the denial of his petition for *certiorari*, the petitioner, as president and treasurer of and attorney for the corporation, filed a petition in bankruptcy on behalf of the corporation, and

(c) the petitioner thereafter filed his claim against the bankrupt estate for legal fees and disbursements, and asserted that the claim was secured in part by an attorney's lien on the fund involved, which the petitioner had continued to hold notwithstanding the judgment of the District Court, and

(d) the trustee in bankruptcy filed objections to the petitioner's claim, and a counterclaim, demanding that the petitioner be required to turn the fund involved over to the trustee, subject to a determination by the court as to the validity of the petitioner's alleged lien, and

(e) the petitioner admitted, and it was a fact, that the subject matter of the trustee's counterclaim was the same as and grew out of the subject matter of the petitioner's claim.

STATUTES AND RULES INVOLVED

In addition to the provision of the Bankruptcy Act quoted in petitioner's brief, the respondent sets out the following relevant statutes and rules:

Title 11, United States Code, Section 11a(7) and (15) (Bankruptcy Act 2a(7) and (15)):

> "a. The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this title, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to—
>
> * * * * * *
>
> "(7) Cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided, . . . and where in a controversy arising in a proceeding under this title an adverse party does not interpose objection to the summary jurisdiction of the court of bankruptcy, by answer, or motion filed before the expiration of the time prescribed by law or rule of court or fixed or extended by order of court for the filing of an answer to the petition, motion or other pleading to which he is adverse, he shall be deemed to have consented to such jurisdiction;
>
> * * * * * *
>
> "(15) Make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this title;" . . .

General Order in Bankruptcy 37, Title 11, United States Code Following Section 53:

> "In proceedings under the Act the Rules of Civil Procedure for the District Courts of the United States shall, in so far as they are not inconsistent with the Act or with these general orders, be followed as nearly as may be. But the court may shorten the limitations of

time prescribed so as to expedite hearings, and may otherwise modify the rules for the preparation or hearing of any particular proceeding."

Rule 13(a) of the Federal Rules of Civil Procedure:

"(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim, which at the time of filing the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action."

COUNTER-STATEMENT OF THE CASE

The petitioner seeks review of a judgment of the United States Court of Appeals for the District of Columbia Circuit, affirming a judgment of the District Court, which in turn affirmed an order of the Referee in Bankruptcy entered May 23, 1961. The Referee's order directed the petitioner, a claimant against the bankrupt estate of Ferro, Inc., to pay the trustee in bankruptcy the sum of $12,030.76, the property of the bankrupt; and the order directed the trustee to hold and conserve the fund subject to the further order of the Court. The order also provided that upon failure of petitioner to comply, his claim against the bankrupt estate should be dismissed; and that upon such failure, the trustee was authorized to institute proceedings against the surety on the supersedeas bond filed by petitioner in Civil Action No. 2924-57 in the District Court (J.A. 15, 18).

This matter had its origin in the case of *John Thompson Beacon Windows, Ltd.* v. *Ferro, Inc., and Bolling R. Powell, Jr.*, Civil Action No. 2924-57 in the United States District Court for the District of Columbia. That action, filed November 21, 1957, requested the aid of the District Court in executing a money judgment entered February 11, 1957,

in favor of John Thompson Beacon Windows, Ltd., against Ferro, Inc. The complaint prayed that payments made by Ferro, Inc. to petitioner Bolling R. Powell, Jr., in satisfaction of alleged pre-existing debts, be declared illegal preferences or transfers and therefore void and, as a consequence, that the Court direct Powell, in behalf of the Corporation, to pay the amount of the judgment of February 11, 1957, plus interest, to the plaintiff John Thompson Beacon Windows, Ltd.

Civil Action No. 2924-57 came on for hearing before Judge Curran, who on November 24, 1959, entered judgment for the plaintiff John Thompson Beacon Windows, Ltd., against Powell. In a memorandum opinion, filed November 17, 1959, Judge Curran had this to say about the facts and the law of the matter:[1]

> "Ferro, Inc. was incorporated in December 1950, with Bolling R. Powell, Jr. acting as Secretary-Treasurer and Director of the Corporation. At the inception of Ferro, Inc. the capital stock was equally divided between Powell (5000 shares) and one Arne Rock (5000 shares). Powell became sole owner of all the stock of Ferro, Inc., February 18, 1952 when he purchased the shares issued to Rock from a third party who was holding the stock as collateral for a then defaulted loan made to Rock. From this time on Powell was the sole stockholder and managing director of Ferro, Inc.
>
> "On January 2, 1952 and February 13, 1952 Ferro, Inc. entered into contract numbers 211 and 213 for the purchase of casement type windows from the plaintiff.

[1] The pleadings, memorandum opinion and judgment in Civil Action No. 2924-57 are set out in full in the Joint Appendix filed in the Court of Appeals in No. 15,533, *Ferro, Inc., and Bolling R. Powell, Jr., Appellants* v. *John Thompson Beacon Windows, Ltd., Appellee*. This Joint Appendix was filed in this Court by petitioner as part of the record in No. 235, October Term, 1960. The opinion of Judge Curran appears at pp. 17-22 of that Joint Appendix.

After some delay the windows were ultimately shipped by plaintiff to Ferro, Inc. and were subsequently sold by Ferro, Inc. to Dewey Brothers of North Carolina for the sum of $17,000. Ferro, Inc. refused to pay any part of the purchase price of the windows to the plaintiff upon demand and in fact used the greater part of the proceeds to repay alleged preexisting loans made by Powell to Ferro, Inc. The matter was submitted to an arbitration tribunal and after a hearing plaintiff was awarded $10,965.54 on January 16, 1957 and this award was reduced to judgment on February 11, 1957 in the District Court for the District of Columbia.

* * *

"Ferro, Inc. started its corporate existence in 1950 with a capitalization of from $500 to $1000. In order that Ferro, Inc. could transact business Powell periodically, during the years 1951-1953, advanced a total of $11,054.48 to the Corporation. In return for these advances Powell received notes from Ferro, Inc. indicating that the advances were in fact loans to the Corporation, rather than additional capital contributions. November 1953 found Ferro, Inc. with $3.73 in its treasury and $20,000 worth of casement type windows, the wholly unpaid for subject matter of contracts numbered 211 and 213 between plaintiff and defendant Ferro, Inc.

"The casement windows did not meet proper specifications and as a result, when Ferro, Inc. sold the windows to Dewey Brothers in November of 1953, only $16,714.33 was realized. Of the total realized Ferro, Inc. applied $11,054.48, plus interest, to the notes held by Powell, and after paying some operating expenses connected with the sale, $368.68 was left for deposit to the treasury of Ferro, Inc. Ferro, Inc. made no attempt to satisfy the debt owing to plaintiff as a result of contracts numbers 211 and 213, from the proceeds of this transaction.

"From the time of the sale by Ferro, Inc. to Dewey Brothers of the casement windows Ferro, Inc. has been unable to meet its financial obligations as they matured and, in an equity sense, is an insolvent corporation. *Finn* v. *Meighan*, 325 U.S. 300.

"* * * Applying the majority rule to the facts in this suit, the conclusion is that Powell created for himself an unfair and unlawful preference when he, acting for Ferro, Inc., used the majority of the proceeds of the sale to Dewey Brothers for the purpose of satisfying the indebtedness of Ferro, Inc. to himself.

"It would follow that, since Powell created for himself an unfair and unlawful preference over the third party creditors, Title 12, Sec. 401 of the District of Columbia Code prohibiting transfers with the intent to defraud, delay or hinder creditors would also apply. * * * Powell certainly intended to hinder or delay his creditor, the plaintiff, when he used his inside position in the one-man corporation to transfer funds, which should have gone to the creditors, to himself as payment for his alleged loans to the Corporation. For this reason, Title 12, Sec. 401 of the District of Columbia Code is applicable and the transfer is void as against plaintiff.

"The repayments of alleged loans totalling $11,054.48, plus interest, by Ferror, Inc., to Powell are therefore void transfers of funds and Powell is hereby directed to repay Ferro, Inc., the total amount he received as a result of the repayment of alleged loans."

The judgment entered by Judge Curran on November 24, 1959, ordered that "Defendant Bolling R. Powell, Jr., pay to defendant Ferro, Inc. the sum of $12,030.76" (J.A. in No. 15,533, p. 22).

Powell appealed from the judgment of November 24, 1959. The judgment was affirmed by the Court of Appeals in a per curiam opinion on April 28, 1960, rehearing denied June 13, 1960, 107 U.S. App. D.C. 400, 278 F. 2d 280. *Certiorari* was denied on October 10, 1960, 364 U.S. 825, (No. 235, October Term 1960) and the judgment became final on October 17, 1960.

Powell has never paid the sum of $12,030.76 or any part thereof to Ferro, Inc. (J.A., 17).

On October 11, 1960, the day after the denial of *certiorari* by this Court, Ferro, Inc. filed its petition in bankruptcy, the petition being signed and sworn to by its President and Treasurer, Bolling R. Powell, Jr., who also signed as its attorney. Schedule A-2 attached to the petition recited that Bolling R. Powell, Jr., was a secured creditor of the bankrupt, the security being described as an "attorney's lien on $11,630.76 in cash." (The schedule is a part of the supplemental record certified to this Court by the Court of Appeals)

On November 1, 1960, Powell filed a proof of claim with supporting exhibits, asserting a claim against the bankrupt estate in the amount of $27,403.29, of which amount $17,713.85 was claimed for legal services and disbursements from 1951 to 1960, inclusive. (J.A., 4). In his proof of claim, Powell swore that "there are no set-offs or counter claims to said debt." He asserted further that his claim was secured to the extent of $11,630.06 by "an attorney's lien on $11,630.06 of Ferro, Inc.'s funds previously collected by him" (Powell) and that "This security is not waived or surrendered by the undersigned whose claim is presented as secured in the amount of $11,630.06 and unsecured in the amount of $15,773.23." The balance of the claim over and above the claim for legal services and disbursements, amounting to $9,689.44, plus interest, was asserted to be "for cash loaned, evidenced by notes given therefor."

Among the exhibits filed in support of Powell's claim for legal services was a document entitled "Minutes of Special Meeting of Board of Directors, Ferro, Inc., May 18, 1960." (The minutes are set out in the supplemental record certified to this Court by the Court of Appeals.) These minutes purported to show that a special meeting of the Board was held at 1741 K Street, N.W., Washington, D. C.—the address of Powell's office—on May 18, 1960, at 7 o'clock in the morning. Present at the meeting were Powell and his wife, constituting two of the three members of the Board.

The third member waived notice of the special meeting. Powell presided as Chairman and Mrs. Powell acted as Secretary. The minutes showed that on motion duly made and seconded, it was unanimously resolved that the Corporation acknowledged its indebtedness to Powell for legal fees and disbursements, and recognized and acknowledged his attorney's lien on all property of the corporation. It was also unanimously resolved "upon motion duly made and seconded" that in view of the insolvency of the Corporation, the President was authorized to "take such steps as, in his discretion he believes to be in the best interest of the Corporation with respect to receivership, bankruptcy, composition and extension or reorganization of the Corporation." Thereupon, "upon motion duly made and seconded it was, by the unanimous vote of the directors present at the meeting, voted to adjourn."

The Trustee filed objections to the entire claim of Bolling R. Powell, Jr., and a counterclaim (J.A., 7). The counterclaim, in substance, demanded that the claimant, Powell, be required to turn over to the Trustee the sum of $12,030.76, the property of the bankrupt admittedly held by him in cash, and that the court determine the validity of the asserted lien of the claimant to or against the fund, or any part thereof, and require the Trustee to hold and conserve the fund pending such determination.

The claimant, Powell, filed an "Answer" to the Trustee's counterclaim and objections. As part of his answer, the claimant denied the jurisdiction of the bankruptcy court over the matter (J.A., 12).

After a hearing, the Referee in Bankruptcy made findings of fact and conclusions of law (J.A., 15). Among other things, after briefly reciting the history of the case, he found that at the first meeting of the creditors in the bankruptcy proceeding on November 1, 1960, Bolling R. Powell, Jr., stated that he would promptly turn over to the Trustee a fund amounting to $11,630.06, with the understanding that he took such action subject to determination of his

claimed rights under an attorney's lien against the fund; and upon such representation by the claimant, Powell, the bond of the Trustee in Bankruptcy was fixed at $12,000. Such bond was thereafter filed and approved.

The Referee also found that:

> "5. The money claimed by Bolling R. Powell, Jr., is the property of the bankrupt and constitutes the only asset of the bankrupt estate, except for the sum of $2.11, held by the Trustee. In addition to the claim of Bolling R. Powell, Jr., in the amount of $27,403.29, claims amounting to $29,615.54 have been filed herein.
>
> "6. At the time of the alleged performance of the alleged services for which an attorney's lien is claimed, the claimant, Bolling R. Powell, Jr., was and he still is the dominant controlling stockholder of the bankrupt, and president thereof, and with his wife he constituted and they now constitute a majority of its board of directors.
>
> "7. It is alleged in the counterclaim, not denied in the claimant's reply thereto, and therefore admitted, and it is a fact, that the subject matter of the counterclaim is the same as and grows out of the subject matter of the claim itself."

The Referee in Bankruptcy concluded that the bankruptcy court had exclusive jurisdiction to determine the validity of the claim asserted by Powell, including the validity and amount of his asserted attorney's lien. The Referee ordered the claimant, Powell, to pay to John W. Maher, Trustee, the sum of $12,030.76, to be held by him subject to further order of the Court; and that upon failure of Powell to comply with this order, his claim should stand as dismissed (J.A., 18). On review by the District Judge, the Referee's order was affirmed (J.A., 23, 24). The District Judge held as a matter of law that the bankruptcy court had jurisdiction to enter the order under review. *In re Ferro, Incorporated*, 198 F. Supp. 244 (D.C.D.C., 1961) In a *per curiam* opinion, the Circuit Court of Appeals affirmed "on the reasoning and authorities recited in the decision" of the District Judge.

ARGUMENT

On the authority of *Alexander* v. *Hillman*, 296 U.S. 222 (1935), *Columbia Foundry Co.* v. *Lochner*, 179 F. 2d 630 (CCA 4, 1950), and *In re Solar Manufacturing Corp.*, 200 F. 2d 327, cert. den. sub. nom. *Marine Midland Trust Co.* v. *McGirl*, 345 U.S. 940 (CCA 3, 1952), the District Court held, and the Circuit Court of Appeals agreed, "that in a bankruptcy proceeding, a creditor who files a proof of claim submits himself to the jurisdiction of the bankruptcy court, not only as to the merits of his claim but also as to any defenses or counter-claims that may be asserted against the claim and that arise out of the same transaction, and, further, that in such case an affirmative judgment or order in favor of the trustee, may be granted by the bankruptcy court against the plaintiff. * * * This Court, therefore, holds that the Referee in Bankruptcy had jurisdiction to make the order that is the subject matter of this petition." (J.A. 25, 26).

The conclusion of the courts below was not only in harmony with the decision of this Court in *Alexander* v. *Hillman*, 296 U.S. 222 (1935), but was required by that decision; and there is nothing in the ruling that conflicts with the decision of any other Circuit Court of Appeals on the same matter.

There are many authorities for the proposition that one who files a proof of claim in a bankruptcy proceeding subjects himself to the summary jurisdiction of the bankruptcy court to adjudicate a counterclaim arising out of the same subject matter as the claim. This general rule had been previously applied by the Circuit Court of Appeals for the District of Columbia in *Brown* v. *Rubinstein, Trustee*, U.S. App. D.C. , 288 F. 2d 168 (No. 16087, 1961). Although the opinion of the Court in that case was *per curiam*, examination of the briefs and record discloses that the Court sustained the summary jurisdiction of the bankruptcy court over a trustee's counterclaims, in the face of

an objection that the claimant had a right to be heard in a plenary action and had not consented to the jurisdiction of the bankruptcy court on the counterclaims. There are many other cases to the same effect.

Alexander v. *Hillman*, 296 U.S. 222 (1935).

Columbia Foundry Co. v. *Lochner*, 179 F. 2d 630 (CCA 4, 1950).

In re Solar Manufacturing Corp., 200 F. 2d 327, cert. den. sub. nom. *Marine Midland Trust Co.* v. *McGirl*, 345 U.S. 940 (CCA 3, 1952).

Florance v. *Kresge*, 93 F. 2d 784 (CCA 4, 1948).

In re Nathan, 98 F. Supp. 686 (D.C.S.D., Calif., 1951).

Inter-State National Bank of Kansas City v. *Luther*, 221 F. 2d 382, cert. granted, 350 U.S. 810, dismissed per stipulation 350 U.S. 944 (CCA 10, 1955).

In *Columbia Foundry Co.* v. *Lochner*, 179 F. 2d 630 (CCA 4, 1950), the Circuit Court of Appeals for the Fourth Circuit summarized the law and analyzed the cases (179 F. 2d 631-634):

"* * * It is settled that in an equity receivership to wind up the business of a corporation and distribute its assets amongst the creditors and stockholders, where non-resident officers of the corporation, who were not parties to the original suit, come in as creditors and claim part of the assets, the court has jurisdiction to entertain a counterclaim against them for assets of the corporation alleged to have been fraudulently converted by them to their own use; and in such a case the court has jurisdiction not only of the subject matter but also of the person, and may grant affirmative relief against the claimants although no process has been issued against them.

"This rule was laid down in Alexander v. Hillman, 296 U.S. 222, 56 S. Ct. 204, 80 L. Ed. 192, notwithstand-

ing the provision of Section 51 of the Judicial Code, 28 U.S.C.A. § 112. The Court said:

"'Respondents appropriately presented their claims and became entitled to adjudication without petition for intervention, any formal pleading or commencement of suit. Unquestionably, they submitted themselves to the court's jurisdiction in respect of all defense that might be made by the receivers and of all objections that other claimants might interpose to the validity, amounts, or priorities of their claims. And they put themselves in position, should their interest warrant, to challenge the receivers' acts and the demands of others claiming as creditors.' 296 U.S. pages 238-239, 56 S. Ct. page 209.

* * *

"This court in Florance v. Kresge, 4 Cir. 93 F. 2d 784, following the principle laid down in Alexander v. Hillman, supra, upheld the jurisdiction of a court of bankruptcy to entertain a counterclaim and to render an affirmative judgment against a creditor who had filed an unsecured claim against the estate, and had also filed an intervening petition in which claim was made for rent collected by the trustee under a contract between the creditor and the bankrupt as a real estate agent.

* * *

"A case of this sort demonstrates the wisdom of the rule laid down in Florance v. Kresge, supra, and the improbability that Congress intended to restrict the use of counterclaims to defensive purposes only. Here the trustee is called upon to pay for goods sold to the bankrupt which, for the purposes of the argument, must be assumed to have been so defective as to cause the bankrupt a loss greatly in excess of the purchase price of the merchandise. The counterclaim relates to the very subject matter of the claim itself. It is conceded that the trustee may prove the counterclaim so as to defeat the claim and it follows that the creditor must produce the same evidence to save his claim as he would to defeat an affirmative judgment against him on the counterclaim." * * *

* * *

"The distinction between a receivership in equity and a bankruptcy proceeding is not valid in this connection. Bankruptcy courts are essentially courts of equity for many purposes; and they sit as courts of equity in dealing with the claims of creditors and try them without the intervention of a jury. Pepper v. Litton, 308 U.S. 295, 303-311, 60 S.Ct. 238, 84 L. Ed. 281; In re International Power Securities Corp., 3 Cir., 170 F. 2d 399, 402; In re Kansas City Journal-Post Co., 8 Cir., 144 F. 2d 791, 800; In re Commonwealth Light and Power Co., 7 Cir., 141 F. 2d 734, 736.

"A careful compilation of the relevant cases, presented to the court by the appellant, is set out in the marginal note. It was decided in a number of them that the filing of a proof of claim against a bankrupt estate does not confer jurisdiction upon the court to enter an affirmative judgment upon a counterclaim against a creditor. It will be noticed, however, that most of them, including the decision of this court in Morton G. Thalhimer, Inc., v. Florance, 4 Cir., 58 F. 2d 23, were decided before the decision of the Supreme Court in Alexander v. Hillman, supra, and that in most of the subsequent cases no mention of that decision is made. In some of the cases the counterclaim was directed to the recovery of property adversely held by the creditor under a preferential transfer from the bankrupt, Kleid v. Ruthbell Coal Co., 2 Cir., 131 F. 2d 372, 373; In re Marmolstein, D.C., E.D.N.Y., 13 F. Supp. 396; In re Florsheim, D.C., S.D.Cal., 24 F. Supp. 991; Feiring v. Gano, 114 Colo. 567, 168 P. 2d 901, 165 A.L.R. 1406. In the pending case, on the other hand, the counterclaim relates to the same subject matter as the claim itself and our decision is confined to a situation of that kind. We need not now decide whether the reasons which underline our decision would require a like result under circumstances similar to those discussed in the cases on which the appellant relies."

In *In re Solar Manufacturing Corp.*, 200 F. 2d 327, cert. den., sub. nom. *Marine Midland Trust Co.* v. *McGirl*, 345 U.S. 940 (CCA 3, 1952), the Circuit Court of Appeals for the Third Circuit said, at page 331:

"In Hillman, Kresge [93 F. 2d 784], Lochner and Nathan [98 F. Supp. 686], as in this appeal, the subject matter of the counterclaim arose out of the same transaction as the claim. This is important because in those circumstances, as we have above indicated, the trustee may have a summary adjudication of the issues upon which his counterclaim depends by raising these issues in his answer to the claim. Appellant offers no reason for compelling the trustee to institute a plenary action in order to obtain affirmative relief where, as here, the issues adjudicated as defenses to the claim would be res judicata in the plenary suit.

"The claims in Hillman were, in large part, for salaries, counsel fees and moneys advanced. The receiver counterclaimed, alleging that the claimants had entered into the transactions out of which the claims arose in bad faith and in violation of their duties as fiduciaries. The receiver argued that an adjudication of the claims could not be made without a consideration of the counterclaim. In the Kresge case the claimant filed proofs of claim for money due him under a contract; the counterclaims asserted by the trustee and receivers arose out of the same contract. The claim in Lochner was based on castings sold and delivered to the bankrupt; the counterclaim alleged that the castings possessed latent defects and it sought an affirmative judgment to recover damages resulting from their use. The Nathan claim was based on money due on a promissory note executed by the bankrupt one month prior to bankruptcy; the counterclaims sought a return of preferences arising out of that transaction. We are in accord with the Nathan opinion that the Hillman rule should be extended to cover situations like the one before us. We hold that Marine subjected itself to the court's summary jurisdiction respecting the counterclaims when it filed its account and proofs of claim. * * *"

The cases cited by the petitioner in his brief were either decided before *Alexander* v. *Hillman*, 296 U.S. 222 (1935), or have been overruled, or are not in point. Thus, *Morton G. Thalhimer, Inc. v. Florance*, 58 F. 2d 23 (CCA 4, 1932) (Brief 5), was overruled by *Columbia Foundry Co. v. Lochner*, 179 F. 2d 630 (CCA 4, 1950). In *In re Vadner*, 17 F. 2d

721 (CCA 9, 1927) (Brief 5), the court held that the Bankruptcy Court did not have summary jurisdiction to order a claimant to deliver to the trustee certain real estate to which the claimant had acquired title under the judgment of a state court, in proceedings in which the Trustee in Bankruptcy had participated. It appeared moreover that the bankrupt had neither possession of nor title to the property at the time bankruptcy proceedings were instituted. *Pickens* v. *Roy*, 187 U.S. 177 (1902) (Brief 5, 6), involved a similar situation. In that case, a judgment creditor of the bankrupt, under a judgment obtained in proceedings instituted in a state court years before the adjudication in bankruptcy, proved up her judgment as a preferred debt in the bankruptcy court. This Court held that the state court having had complete jurisdiction of the bankrupt and his property for years at the time of the adjudication, that jurisdiction was not divested by the proceedings in bankruptcy; nor was the state court deprived of jurisdiction when the judgment creditor proved up her judgment in the bankruptcy court. Obviously, the *Vadner* and *Pickens* cases on their facts are not relevant to the situation in the case at bar.

Cline v. *Kaplan, et al*, 323 U.S. 97 (1944) (Brief 5, 6), is likewise not in point. In that case, a trustee in bankruptcy filed a petition for an order directing the respondents to turn over certain assets allegedly belonging to the bankrupt. The respondents' answer claimed ownership in themselves and prayed dismissal of the petition. Upon the basis of *Louisville Trust Company* v. *Comingor*, 184 U.S. 18 (1902), this Court held that in view of the respondents' timely objection their claim of ownership could not be determined by summary judgment. The *Comingor* case, upon which the decision in *Cline* v. *Kaplan* rested, also involved a rule to show cause, and the Court emphasized that the respondents there "did not come in voluntarily, but in obedience to peremptory orders" under the rule to show cause (184 U.S. 18, 26). Similarly, in *In re Eakin*, 154

F. 2d 717 (CCA 2, 1946) (Brief 5), the trustee petitioned for an order directing a bank to pay over to the trustee certain funds on deposit in the name of the bankrupt, and the bank in its answer denied the existence of the debt, but as an alternative claimed a right of setoff. It is plain that the doctrine of such cases, where respondents were brought into court by peremptory process, has no application here, where a claimant voluntarily invoked the jurisdiction of the bankruptcy court by filing his claim and requesting that court to pass upon it. One who is voluntarily in court stands upon a different footing than one who is dragged protesting before the bar. See *Interstate National Bank of Kansas City* v. *Luther*, 221 F. 2d 382, 388, cert. granted, 350 U.S. 810, dismissed per stipulation, 350 U.S. 944, (CCA 10, 1955).

In re Majestic Radio and Television Corporation, 227 F. 2d 152, cert. den. 350 U.S. 995 (CCA 7, 1955) (Brief 5, 6), does not support the petitioner's argument. The court there held only that by filing a claim, a litigant did not consent to summary adjudication by the bankruptcy court of a counterclaim arising out of subject matter which had no relation to his claim. The court specifically recognized that the bankruptcy court did have summary jurisdiction when the claim and the counterclaim arose out of the same subject matter. The court said (227 F. 2d 156):

> "It is obvious that filing a claim in a Bankruptcy Court is an implied consent to summary adjudication by that court of any counterclaims based upon the subject matter of that claim. A litigant could hardly claim a recovery on the basis of a certain fact situation without permitting the court to decide all of the legal consequences of that situation. No party can invite summary adjudication on only part of the relevant evidence relating to the subject matter of the claim. If all of such evidence shows that each party is liable to the other the court will set off one claim against the other and render judgment for only any balance found to be due. In other words, if you invite a Bankruptcy

> Court to review a set of facts for your benefit, you invite it to review all pertinent related facts even though they should tend to prove your opponent's case. But it does not follow that by filing a claim a litigant has impliedly consented to the summary adjudication in the Bankruptcy Court of a counterclaim arising out of subject matter which has no relation to his claim."
>
> * * *

The facts in the case at bar bring it squarely within the doctrine of *Alexander* v. *Hillman*, 296 U.S. 222 (1935), and demonstrate that the decision below was clearly right.

The petitioner, the president and dominant and controlling stockholder of a corporation, as well as a director of the corporation and its attorney, was ordered by a judgment of the District Court in a civil action to pay over to the corporation a fund, property of the corporation, which the court found the petitioner had transferred to himself with intent to defraud, delay or hinder creditors. On appeal the judgment of the District Court was affirmed, and thereafter *certiorari* was denied. On the day following the denial of his petition for *certiorari*, the petitioner, as president and treasurer of and attorney for the corporation filed a petition in bankruptcy on behalf of the corporation. The petitioner did not list his judgment debt to the corporation in the schedule of assets of the corporation, filed with the petition. Thereafter, the petitioner filed his claim against the bankrupt estate for legal fees and disbursements, and asserted that the claim was secured in part by an attorney's lien on the fund which the petitioner had been ordered to surrender to the corporation, but which the petitioner had continued to hold. The petitioner in his claim swore that there were no setoffs or counterclaims to the alleged debt of the corporation to him. He further stated in his claim that the "security [of his attorney's lien] is not waived or surrendered by the undersigned."

Under these circumstances, the petitioner contends that the Bankruptcy Court had no jurisdiction, on a counter-

claim against him by the Trustee in Bankruptcy, to order him to turn over to the Trustee the fund involved, subject to a determination by the court as to the validity of the appellant's asserted attorney's lien. We submit that the petitioner is in error.

In the first place, it is important to note that the petitioner admits, as he must, that the fund involved is the property of the bankrupt which came into and remains in the hands of the petitioner as an officer of or attorney for the bankrupt. It was therefore appropriate for the bankruptcy court to order that this property, belonging to the bankrupt and in the bankrupt's constructive possession, be turned over to the Trustee. Such a turnover order was a necessary step in fulfilling the function of the bankruptcy court to cause the estate of the bankrupt to be collected, and to determine controversies in relation thereto. Bankruptcy Act, Sec. 2a(7), (15), 11 USCA Sec. 11a(7), (15); See *Maggio* v. *Zeitz*, 333 U.S. 56, 61-63 (1948); *Whitney* v. *Wenman*, 198 U.S. 539 (1905). In the *Wenman* case, this Court said (198 U.S. 552):

> "We think * * * in view of the broad powers conferred in § 2 of the bankrupt act, authorizing the bankruptcy court to cause the estate of the bankrupt to be collected, reduced to money, and distributed, and to determine controversies in relation thereto, and bring in and substitute additional parties when necessary for the complete determination of a matter in controversy, that when the property has become subject to the jurisdiction of the bankruptcy court as that of the bankrupt, whether held by him or for him, jurisdiction exists to determine controversies in relation to the disposition of the same, *and the extent and character of liens thereon or rights therein.*" (Emphasis supplied)

It was likewise proper for the bankruptcy court to refuse to consider the petitioner's claim unless he first turned over the fund, in compliance with the outstanding judgment against him in favor of the corporation. By imposing this

condition precedent, the court was only requiring the petitioner "to do equity before receiving equity in the bankruptcy proceedings." *Inter-State National Bank of Kansas City* v. *Luther*, 221 F. 2d 382, 389, cert. granted, 350 U.S. 810, dismissed per stipulation, 350 U.S. 944 (CCA 10, 1955).

The petitioner claims that he seasonably objected to the summary jurisdiction of the bankruptcy court to enter the turnover order, and that in the light of his objection, the bankruptcy court had no such jurisdiction. A short answer to petitioner's contention is that his objection to the bankruptcy court's jurisdiction was made for the first time in his answer to the Trustee's counterclaim, after the petitioner had voluntarily invoked the court's jurisdiction by filing his claim. His statement in his proof of claim, that he did not waive or surrender his security, was not a denial of the court's jurisdiction, but only an attempted reservation of whatever rights he might have in the fund, by way of an attorney's lien. The turnover order specifically recognized the petitioner's claim of an attorney's lien, and provided that the fund should be held by the Trustee subject to a determination of that claim. The petitioner's rights, as asserted in his claim, were thus fully preserved and protected by the turnover order, and he could not defeat the court's jurisdiction by his belated objection.

In any event, the petitioner's objection to the summary jurisdiction of the bankruptcy court must fail. He voluntarily invoked that jurisdiction by filing his claim and asking the bankruptcy court to rule upon its validity; and having done so, he may not deny the court's jurisdiction to adjudicate a counterclaim which he admits grew out of the same transaction which gave rise to his claim. He may not invoke the court's jurisdiction and at the same time deny it. In other words, he "invokes that jurisdiction risking all of the disadvantages which may flow to him as a consequence as well as gaining all of the benefits." *Case* v. *Los Angeles Lumber Products Co.*, 308 U.S. 106, 127

(1939). Moreover, by alleging in the claim that there were no setoffs or counterclaims, the petitioner expressly tendered the issue as to the existence of a counterclaim. *In Re Nathan*, 98 F. Supp. 686, 691 (D.C. S.D., Cal., 1951). In this situation, the counterclaim pleaded by the Trustee was a compulsory counterclaim. FRCP 13(a); General Order 37, 11 USCA following Sec. 53; Collier on Bankruptcy, (14th ed. 1961) Sec. 23.08(6).

The language of this Court in *Pepper* v. *Litton*, 308 U.S. 295 (1939) is pertinent here, in view of the appellant's legal maneuvering to avoid compliance with a judgment of the District Court entered against him over three years ago. In *Pepper* v. *Litton*, the Court said (308 U.S. 308-312):

> "As we have said, the bankruptcy court in passing on allowance of claims sits as a court of equity. Hence these rules governing the fiduciary responsibilities of directors and stockholders come into play on allowances of their claims in bankruptcy. In the exercise of its equitable jurisdiction the bankruptcy court has the power to sift the circumstances surrounding any claim to see that injustice or unfairness is not done in administration of the bankrupt estate. And its duty so to do is especially clear when the claim seeking allowance accrues to the benefit of an officer, director, or stockholder. That is clearly the power and duty of the bankruptcy courts under the reorganization sections. * * * Similar results have properly been reached in ordinary bankruptcy proceedings. Thus, salary claims of officers, directors, and stockholders in the bankruptcy of 'one-man' or family corporations have been disallowed or subordinated where the courts have been satisfied that allowance of the claims would not be fair or equitable to other creditors. And that result may be reached even though the salary claim has been reduced to judgment. It is reached where the claim asserted is void or voidable because the vote of the interested director or stockholder helped bring it into being or where the history of the corporation shows dominancy and exploitation on the part of the claimant.

It is also reached where on the facts the bankrupt has been used merely as a corporate pocket of the dominant stockholder, who, with disregard of the substance or form of corporate management, has treated its affairs as his own. And so-called loans or advances by the dominant or controlling stockholder will be subordinated to claims of other creditors and thus treated in effect as capital contributions by the stockholders not only in the foregoing types of situations but also where the paid-in capital is purely nominal; the capital necessary for the scope and magnitude of the operations of the company being furnished by the stockholder as a loan.

* * * He who is in such a fiduciary position cannot serve himself first and his cestuis second. He cannot manipulate the affairs of his corporation to their detriment and in disregard of the standards of common decency and honesty. He cannot by the intervention of a corporate entity violate the ancient precept against serving two masters. He cannot by the use of the corporate device avail himself of privileges normally permitted outsiders in a race of creditors. He cannot utilize his inside information and his strategic position for his own preferment. He cannot violate rules of fair play by doing indirectly through the corporation what he could not do directly. He cannot use his power for his personal advantage and to the detriment of the stockholders and creditors no matter how absolute in terms that power may be and no matter how meticulous he is to satisfy technical requirements. For that power is at all times subject to the equitable limitation that it may not be exercised for the aggrandizement, preference, or advantage of the fiduciary to the exclusion or detriment of the cestuis. Where there is a violation of those principles, equity will undo the wrong or intervene to prevent its consummation.

"On such a test the action of the District Court in disallowing or subordinating Litton's claim was clearly correct. Litton allowed his salary claims to lie dormant for years and sought to enforce them only when his debtor corporation was in financial difficulty. Then he used them so that the rights of another creditor were

impaired. Litton as an insider utilized his strategic position for his own preferment to the damage of Pepper. Litton as the dominant influence over Dixie Splint Coal Company used his power not to deal fairly with the creditors of that company but to manipulate its affairs in such a manner that when one of its creditors came to collect her just debt the bulk of the assets had disappeared into another Litton company. Litton, though a fiduciary, was enabled by astute legal maneuvering to acquire most of the assets of the bankrupt not for cash or other consideration of value to creditors but for bookkeeping entries representing at best merely Litton's appraisal of the worth of Litton's services 'over the years.' " " "

It is submitted that the order of the bankruptcy court, which would bring to an end the petitioner's "legal maneuvering" was entirely proper and within the jurisdiction of that court; and that in so holding the Circuit Court of Appeals properly applied the doctrine of *Mc cauley v. Hillman*, and rendered a decision in complete harmony with the decisions of other Circuit Courts of Appeals.

CONCLUSION

For the foregoing reasons it is submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

ROGER ROSE
1100 Tower Building
Washington 5, D. C.

Attorney for
John W. Maher, Trustee in
Bankruptcy, Respondent

September, 1962